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Indian Springs v. Indian Springs Land Inv. Appellant's Reply Brief Dckt. 34623

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IN THE IDAHO STATE SUPREME COURT

August 25, 2008

INDIAN SPRINGS LLC, ASSIGNEE of D. M. & SHIRLEY THORNHILL, Husband and Wife, et al

Plaintiffs/Respondents

Vs.

TERRY ANDERSEN and ROSANNA ANDERSEN, Husband and Wife, et al

Defendants/Appellants

SUPREME COURT DOCKET

34623

APPELLANT'S REPLY BRIEF

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TABLE OF CASES AND AUTHORITIES

Defendants/Appellants Terry Andersen and Rosanna Andersen (hereafter, "Andersens"), having filed the Appellants' Brief, and having received copies of the Respondents' Brief, hereby file the Reply Brief in Support of Appeal.

APPELLANTS' INTEREST

Andersen's interest in the subject property is the VESTED INTEREST and Managerial Responsibilities in the companies understood to have claims in Indian Springs. Andersens have personal funds, property and time invested in these companies and in the business.

STATEMENT OF THE CASE

Respondents' Brief is such a tangle of misinformation and believed irrelevance that appellants can only deny the overall content. The Respondents' "strategy" appears to be to create as much confusion and frustration in the courts as possible.[1] Their pleadings attempt to show the initial clouding and ambiguity of the title to be the fault of the Andersens and what is portrayed as their "alter egos". Therefore, the Appellants will make this last attempt to clarify the true facts and point to documented evidence to demonstrate the misinformation and fraud perpetrated by the Plaintiff/Respondent on the lower court, and now in the Idaho Supreme Court.

CLOSING DOCUMENTS CONFUSED FROM THE START

NOTE: It was Attorney Lyle Eliasen who was the Closing Agent on the Sale of the Property

[1] This is like trying to call an orange an apple. Both the orange and apple are fruits. Both are sweet. Both are round. However, calling an orange an apple DOES NOT make it an apple or visa versa!

in July, 1996 (see Clerk's Record - hereafter "CR" - pp. 22, 23, 28, 29, 74, 85, etc.). It was this same Lyle Eliasen who initiated the Complaint (CR - p. 1). Eliasen was abruptly replaced by the current firm (Racine, et al) (CR p. 159).

The Respondent would have the Court believe that Terry Andersen created the confusion with the multiple parties named in the closing documents. In fact, Terry Andersen relied on the professionals (Thayne Christensen of Utah — Metro Title of Salt Lake City, UT — and the Denver Law Firm - Minor & Brown, P.C.) to prepare the closing papers as agreed and according to law and established methods. Terry Andersen was not informed, nor aware that Lyle Eliasen had made significant changes in the documents[2], as was discovered in May, 2007 (see Clerk's Supplemental Record - hereafter "CSR" - Exhibit B). At the closing, the only changes authorized were the changes from Recreational Properties A&B LLC (hereafter - "A&B LLC") to Recreational Properties A&B, a Partnership (hereafter - "A&B") (see CSR, pp. 71, 72 & 73).

THE ESTABLISHMENT OF THE BUSINESS AS A PARTNERSHIP

As partners, Andersens and John Baker & Wife, performed subsequent actions that clearly support their belief that the partnership had purchased the property.

- Partnership Agreement (CSR, p. 177-178)
- Registration of the Assumed Business Name (CSR, p. 77)
- Federal Income Tax Report (CSR, p. 79 & 105)
- Irrevocable Option for Transfer of Partnership Interest (CSR, p. 112-115)

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[2] The overnight drafting of a partnership agreement, managing overseas business, as well as taking control of Indian Springs during mid-season, learning the specifics of the equipment and business as organized, testing and licensing and getting required permits resulted in Terry Andersen being sleep-deprived and not alert at the closing.

PARTNERSHIP LAW DEMANDS THE DEEDS SHOULD TRANSFER THE PROPERTY TO THE PARTNERSHIP

IC § 53-3-204 (c) Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or one (1) or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or the existence of a partnership.

Several Closing documents show the intention of the parties that the Deeds should have transferred the property to the partnership:

- Sales Agreement (CR, p. 18)
- Promissory Note (CR, p. 34)
- Seller's Escrow Instructions (CSR, p. 71)
- Buyer's Escrow Instructions (CSR, p. 72-73)

NONE of the documents sent to Managing Partner Terry Andersen by Eliasen, the closing agent, indicated the parties to whom the deeds were actually deeded to (see CSR, p. 75). This explains why the errors on the deeds were discovered at a much later date, sometime in 2002. At that time, the Andersens were involved in a Chapter 11 Reorganization FBO AICO Recreational Properties LLC, the management company, due to Title issues that prevented refinancing.

COMPLEXITY AND AMBIGUITY OF THE CLOSING DOCUMENTS NONE OF THE DEFENDANTS HAVE AN INTEREST ON WHICH TO FORECLOSE

The complexity and ambiguity of the closing documents have created frustration in several courts which have failed and refused to clarify Title. An analysis of the multiple defendants will show that NONE HAVE AN INTEREST on which to foreclose.

ANALYSIS OF MULTIPLE DEFENDANTS' INTERESTS

INDIAN SPRINGS LAND INVESTMENT LLC: has been dissolved, but was the recipient of the McKinney Sheriff's Deed on Indian Springs (CSR, p. 105).

RON BITTON AND PROFESSIONAL ESCROW SERVICES: (hereafter, "PES") This company was put out of business by the courts for malpractice. This is where McKinneys and Bakers real estate transactions were handled, but these defendants have NO KNOWN INTEREST in the Subject Property.

EVERETT AND ARDIS McKINNEY REVOCABLE TRUST U/I/D SEPTEMBER 25, 1998, Denise McKinney, trustee: This trust was the recipient of the note and mortgage on Indian Springs unlawfully removed from escrow by Ron Bitton of PES (CR, p. 196 and CSR, p. 24).

AICO RECREATIONAL PROPERTIES LLC, an **Idaho** Limited Liability Company (hereafter, "AICO - Idaho") was organized December 10, 1996 (5 months after the closing on Indian Springs) (CSR, p. 61-64). This Company has NO INTEREST, as established through later discussion in this Reply Brief.

RECREATIONAL PROPERTIES A&B, A Partnership — the understood and intended owner as correctly determined by the lower court. However, the Deeds reflect neither the Partnership nor the Partners. Without correction of the Deeds to transfer the property to the purchaser,

Recreational Properties A&B has no interest (CR, p. 184 & 186).

TERRY W. ANDERSEN and ROSANNA ANDERSEN, Husband and Wife, claim no interest in the subject property, in that they never signed as such, nor was that the intent. Rosanna Andersen was not even in Idaho at the time of closing. Andersens interest is in the partnership A&B with Terry Andersen as managing partner, and as manager and members of Recreational Properties A&B LLC of Colorado. **Andersens have made significant personal and financial sacrifices for Indian Springs and, as managers, have done their best to protect the interests of the members of A&B LLC who have limited ability to participate.**

TERRY W. ANDERSEN, TRUSTEE OF ANDERSEN LIVING TRUST has been deeded the property. HOWEVER, said trust does not exist, and has never existed outside the Thornhill deeds (CR, p. 184 & 186). The members of A&B LLC have no interest in forming said trust to replace their fully organized LLC, nor is it timely.

JOHN K. BAKER and JULIE A. BAKER, Husband and Wife, are also believed to be shown on the deeds in error. Julie Baker was neither present nor signed any documents closing on the Indian Springs Property. It is not logical that other Baker associates (i.e. David and Paloma Baker and Brett and Tammy Harrison, Tom and Diane Tucker, McKinneys or any others known as partners) would be a part of "husband and wife", therefore these defendants are listed in error, and have NO INTEREST. Bakers, via Baker Land Management, lost their interest in the partnership, NOT by their personal transferral by deed to AICO (which is believed to be fraudulent and without merit). The Baker interest was lost incrementally as per the Partnership agreement (CSR, p. 178, par. on monthly payments) and breach of that

contract (CSR, p. 177, par. on first right of refusal). The partnership was dissolved, and is winding up its affairs.

EVERETT W. McKINNEY AND ARDIS E. McKINNEY are believed at best to have an interest via the Baker's mortgaged ½ interest (CSR, p. 138), not in the property, but in the partnership (IC 53-3-203, IC § 53-3-501 & IC § 53-3-502), which is believed to be all Bakers had to legally mortgage, and such a mortgage was in violation of the partnership agreement. However, the failed deeds do not name the partnership, therefore, it is believed that McKinneys have no interest. McKinneys (and their trust) also foreclosed on a company (AICO) which had NO INTEREST in the subject property.

TODD W. ANDERSEN AND PENNY L. ANDERSEN, Husband and Wife, have no interest in that they did not exercise the Option for the Baker Partnership Interest which, with the failing to deed the property to the Partnership would have netted them nothing. Their position was re-affirmed in the lower court (CR, p. 287).

TERRY W. ANDERSEN AND ROSANNA ANDERSEN, TRUSTEES OF THE TERRY WARD ANDERSEN AND ROSANNA ANDERSEN LIVING REVOCABLE TRUST DATED FEBRUARY 1, 1991 acted only as Guarantor on the Note (obligation) (CR, p. 191) for the partnership that was the intended purchaser of Indian Springs which, in turn, was deeded to other parties.

GLEN C. MAHONEY AND JANE DOE MAHONEY (Donna is now in a rest home) have a personal home and storage unit at Indian Springs, but no interest in the subject property. They and the Ells have been subjected to unspeakable injustices as a result of the Indian Springs mess.

NOTICE: The ONLY viable claim to Indian Springs via deeds is that of Recreational Properties A&B LLC, the Colorado Limited Liability Company, as shown in the footers to the deeds and in the headers and footers in the legal description (see CR, p. 186, footer, and CR, p. 187-188, headers & footers). A&B LLC is NOT a defendant, and is comprised of a group of members (numbering more than a dozen generally unrelated persons). The partnership A&B does NOT APPEAR in the Deeds in any manner whatsoever. However, A&B LLC, which *PRECEDED* the Partnership in interest, is clearly the party to which the Deeds were directed with "Thornhill to Recreational Properties A&B LLC." A&B LLC has further interest by and through its manager, Terry Andersen, who spent seven (7) years managing the business, and corrected multiple undisclosed problems identified by the Engineers (CSR, p. 120-123) in the property. *This investment is shown in the Omitted Counterclaim of $870,000* submitted in conjunction with the Motion for Reconsideration, Joining of Indispensable Parties, and New Trial (CSR, p. 39-41).

BAKERS ALSO CONFUSED THE TITLE

In September of 1997, one member of AICO Idaho (NOT the manager) took an Option to purchase the Baker Partnership Interest (CSR, p. 112-115). It has been determined in the courts that this Option was NEVER EXERCISED. The instruments deposited into escrow with PES were wrongfully removed from escrow by Ron Bitton, and recorded by American Title Company at the request of Ron Bitton. The Condition Precedent (to be exercised **in writing**) for these documents to be removed from escrow was NEVER SATISFIED. Therefore, a mortgage, note, and a Warranty Deed signed by Baker SHOULD STILL BE IN ESCROW. The recording of these instruments added to the confusion of Title created at the closing in 1996.

> Bakers offered the Option on the Baker interest in the partnership in return for paying off another mortgage that Baker had with McKinney. It was unknown that Bakers had mortgaged their partnership interest, OR WHAT THEY BELIEVED was

their ½ ownership in Indian Springs to McKinney for which Bakers received $150,000 (see CSR, p. 138 — instrument discovered on Feb 18, 2003). The Baker Deed placed in Escrow transferred the full Partnership Property to AICO, claiming Bakers owned the property, and there were NO ENCUMBRANCES. (The deed, at face value, indicates Bakers had paid off the total obligations to Thornhill and to McKinney.) This "deed" effectively diverted the interest of members of A&B LLC and the Partnership to a third party.

McKINNEYS FURTHER CONFUSED THE TITLE

McKinneys, under the direction of Denice McKinney as Trustee, acted to foreclose on the Mortgage wrongfully removed from Escrow. McKinney did NOT foreclose against the partnership A&B, nor against the Bakers (as represented by Atty. Erickson to the lower court), nor Baker Land Management, nor A&B LLC, nor the Andersen Living Trust (created at the closing, and shown on the Thornhill Deeds). McKinneys received a Default Judgment because AICO's legal counsel failed to appear.

Said counsel belatedly recommended AICO go into a Chapter 11 Reorganization to:

- Clear up the Title
- Stop the McKinney tortuous interference
- Challenge the $150,000 debt they claimed
- Settle issues of the partnership
- Settle the non-disclosure issues with Seller Thornhill
- Transfer the interests of the members of A&B LLC to a new company under protection of the Court.

This Reorganization would have cleared up Title Issues that had become apparent in the attempts to re-finance the Thornhill obligation. It appears Thornhill objected to the reorganization,

in part, to avoid the embarrassment of his fraudulent Disclosure Statement in connection with the Sale of Indian Springs. (CSR, p. 100-101). **His objection in the bankruptcy court also placed the amount owing as of April 12, 2002 at $254,000 (CSR, p. 101, par. 13).** His objection drew attention to the mis-deeding, and prompted Andersens to contact Metro Title of Salt Lake City, UT and obtain copies of the Deeds sometime in 2002.

> *NOTE: Under the Reorganization Plan, ALL legitimate debts would have been fully paid. A $40,000 emergency loan for pre-season work to alleviate environmental and public safety issues was repaid, and additional payments are believed to have gone to the Thornhill contract by and through McKinney.*

- The Attorney for AICO was fired, and his fees challenged for malpractice and collusion.
- The US Trustee moved to dismiss or convert on unsubstantiated grounds.
- The Bankruptcy Court Judge lifted the stay for the McKinneys, allowing them to pursue a foreclosure.
- The same Bankruptcy Court Judge then recused himself when it was learned that his son was an attorney with the firm representing McKinneys in the foreclosure.
- The replacement judge, in spite of the evidence that the debtor AICO did not have Title, appeared to have only one purpose — to punish the bankrupt company and the Andersens. The replacement judge:
  - Gave a lease to the seller (Thornhill) to run the property, resulting in new equipment being damaged or disappearing with fixtures and personal property.
  - Allowed the conversion from a Chapter 11 to a Chapter 7 at the combined motions of the Trustee, the McKinneys, and Thornhill.
  - Assigned R. Sam Hopkins as the trustee to oversee the Chapter 7 closure of the

business, and the management of the estate.

AICO RECREATIONAL PROPERTIES LLC, THE MANAGEMENT COMPANY

1. AICO Recreational Properties LLC, The **Colorado** Limited Liability Company (hereafter "AICO - Colorado") organized in the spring of 1996 as a management and development company made the initial purchase offer for Indian Springs (CSR, p. 53 & 57).

2. AICO - Colorado's purpose was to ensure a continuity of management, should Terry Andersen be unable to continue. This LLC consisted of 2 parties as instructed by the IRS inasmuch as it would be reported on the 1065 Partnership Forms. The 2 parties were The Terry Ward Andersen and Rosanna Andersen Living Revocable Trust, dated February 1, 1991, and Terry Andersen, Trustee.

3. When Recreational Properties A&B LLC, the Colorado Limited Liability Company (hereafter, "A&B LLC") was organized June 27, 1996 (CSR, p. 67) AICO - Colorado's interest was combined with that of the investors into A&B LLC and AICO - Colorado was thereafter administratively dissolved.

4. AICO - Idaho was organized at first like the Colorado LLC (CSR, p. 64), then it went through a reorganization wherein Terry Andersen became Manager only.

5. A Quitclaim Deed from Terry Andersen, Trustee of AICO - Colorado to AICO - Idaho, Terry Andersen, Manager, was only recorded at the request of the assessor's office in order to get tax notices (which had been going to Baker's former address) to a party who would pay them (CSR, p. 43).

NOTE: The quit-claim deed (CR, p. 200) which the Plaintiff/Respondent errantly claims transferred the property to AICO, actually transferred any interest that AICO of Colorado had to AICO of Idaho. (Detailed analysis found in Arguments section of this Brief)

Plaintiff errs in their claim that this deed was from the "Andersen Living Trust" named on the Deeds. There was NO mention nor intent with regard to said Trust in the Quitclaim Deed.

6. One of the "members" (not the manager - IC § 30-6-407 (3)) of the reorganized AICO - Idaho took an Option on the "Baker" interest (CSR, p. 112-115). It has been clearly established in the courts that the Option was never exercised.

7. A mortgage produced by Ron Bitton of PES (and apparently Baker) was NOT on another Baker property which the Optioneer would pay off in exchange for the Baker interest (as Baker offered), but rather on Indian Springs. Said mortgage was not identified on its face as on Indian Springs and the legal description was not recognized to make that connection (CSR, p. 48).

8. Bakers place a Warranty Deed and Bill of Sale in escrow with the Option Agreement for purchase of the Baker "partnership interest." The Warranty Deed declared John K. Baker and Julie A. Baker to be the full owners of Indian Springs ("in fee simple") and they were deeding it to AICO free and clear of encumbrances (CSR, p. 196). The effect of this deed from Bakers is believed to deprive the members of A&B LLC of their interest as partners.

9. Bakers then entered into a separate (undisclosed to partners) contract with defendants Everett W. And Ardis E. McKinney, husband and wife, (hereafter "McKinney") wherein Bakers mortgaged to McKinney "½ ownership" in Indian Springs

(understood to be the partnership property) in return for $150,000.00 (CSR, p. 138).

10. The mortgage and deed in escrow with the Option was extracted by Ron Bitton and recorded without authorization (CR, p. 196). Thereafter, said Bitton FAILED TO DELIVER the deed.

11. It was made to appear that McKinney was acting as Bakers' partner, making his belated payments, then McKinneys moved to foreclose in Indian Springs (CSR, p. 90).

12. Refinancing to pay off the "Assignor" (Thornhill) Mortgage and arrange to purchase the partner's interest was impossible because of the corruption of the Title.

13. McKinney was delivered a default judgment when the Indian Springs attorney who took the Complaint to answer, then failed to answer or appear (CSR p. 56-).

14. The same attorney recommended a Chapter 11 reorganization to settle issues of Title, partnership, costly seller misrepresentation, and secure the interests of members of A&B LLC and to determine any other partnership interests that might remain on the Baker side of the partnership. All legitimate debts would be paid, but the $150,000 McKinney gave to Bakers would be challenged.

15. Collusion and personal agendas distorted the outcome in the Bankruptcy Court.

16. The Bankruptcy Court and Trustee assigned were fully informed as to the Title issues.

17. The case was not heard on its merits in the State Court and an appeal was dismissed when McKinney's attorney and the bankruptcy trustee (appealing parties aside) entered into a stipulation agreement to give the property to McKinney if it didn't sell

(CSR, p. 80-82).

18. **The final determination of ownership in the Bankruptcy Court, was that <u>there was NO FINAL DETERMINATION</u> AND IT WOULD HAVE TO BE SETTLED IN THE State Courts** (CSR, p. 160-163).

19. It has been accurately determined in the lower court that the partnership was the purchaser. HOWEVER, the Plaintiff/Respondent's determination to wrongly convince the court that "all the parties were the same" diverted the court from accurately identifying the partners as A&B LLC (see footers on CSR, p. 29-31) and Baker Land Management (hereafter, "Baker") (See Exhibit entitled *Amended Memorandum in Support of Amended Motion for Title Clarification, Recision of Deeds, and Dismissal of Case - Exhibit A*).

20. Thereafter, the Respondent represented to the lower court that McKinney had foreclosed on the Bakers and the partnership as well. This falsehood can be found clearly evident in the caption page on the McKinney Sheriff's Deed in the complaint (CSR, p. 60).

21. It has become clear that the objective of this foreclosure action was NOT to have the Note (obligation) paid and release the mortgage, but to provide a means to cut out any and all other parties of their interest and allow only the McKinneys any redemption rights (see Exhibit entitled *Amended Memorandum in Support of Amended Motion for Title Clarification, Recision of Deeds, and Dismissal of Case - Exhibit A*).

22. Clearly, the only interest AICO could have had was through the Baker's unauthorized

and not for the partnership Deed designed to defraud partners of their interest. There were Motions before the lower court to rescind or quash this deed, correct the Seller's deeds, and join essential parties.

23. AICO was still in bankruptcy under the protection of the automatic stay at the time of the *deficient* Notice of Default (CSR, p. 115-120) cited and the Summons and Complaint were not delivered to the Trustee as the only one to receive such for AICO.

R. Sam Hopkins, acting as trustee, was fully informed of the Title issues, and of the Ells' ownership of the modular 3-bedroom home. During these proceedings, an appeal was made by the Andersens to the Supreme Court (docket # 29140) in the Judge Woodland decision to allow the foreclosure by the McKinneys. Trustee Hopkins, over-zealous in his actions to look over the estate, **violated the Andersens personal civil rights.**

Acting under the Color of Law, Trustee Hopkins:

- Apparently on a witch hunt, bypassed business mail addressed to AICO, favoring to open personal mail addressed to the Andersens. It took several complaints to the US postal service to stop this violation.
- Entered into a Stipulation Agreement with McKinney to turn the property over to them. This Stipulation caused the Supreme Court to dismiss the Andersen Appeal to the McKinney foreclosure.
- Ousted the Andersens from their personal home with the threat of US Marshall intervention.

FINALLY, Trustee Hopkins moved to abandon the property because he could not get clear

title, and the property was burdensome. The Bankruptcy judge declared that he could NOT determine ownership, and granted possessory rights as follows:

- The land to McKinneys based on the sheriff's deed acquired by default.
- The personal property to Thornhill based on an EXPIRED UCC1 report which listed only a small portion of the personalty Thornhill took possession of.
- The 3-bedroom home to Ells. Ells and Mahoneys had clear ownership by title of the 2 homes on the subject property and these were granted to them.

MISREPRESENTATIONS IN THE LOWER COURT

In the lower court, the Respondent began by posing to the court that the title issues had been resolved and were res judicata. The Honorable Judge Ronald E. Bush astutely researched and ascertained that was INCORRECT (CR, p. 310, last sentence to top of CR, p. 311 to the end of the paragraph), and that "A&B is NOT collaterally estopped from claiming an interest in the property at this time." HOWEVER, relying on several misrepresentations presented to the court by the Plaintiff/Respondent, the judge ruled that A&B could not claim an interest in the property. These misrepresentations are enumerated in the Appellants' Motion for Reconsideration (CSR, p. 14-45), and summarized on pg. 29 and 30 of the Appellants' Brief, and are again listed here for the Court's convenience:

MISREPRESENTATIONS:

- The Plaintiff/Respondent incorrectly represented that several business entities were "one & the same."
- The Plaintiff/Respondent wrongly represented that the buyers requested the changes in the Deeds.
- The Plaintiff/Respondent wrongly represented that Terry and Penny Andersen d/b/a AICO borrowed additional money in the amount of $149,720.69.

- The Plaintiff/Respondent wrongly represented that Recreational Properties A&B borrowed an additional amount of $40,000.
- The Plaintiff/Respondent misrepresented that *Andersens v. PES, et al* produced a judgment of Foreclosure and a Sheriff's Sale.
- The Plaintiff/Respondent misrepresented that Andersens and Bakers received and recorded the Deeds.
- The Plaintiff/Respondent wrongly represented that entities with no interest in the subject property were in default of the Mortgage.
- The Plaintiff/Respondent wrongly represented that only AICO should have filed the response to the Complaint. (This is believed to be for the purpose of securing McKinneys' and Thornhill's temporary possessory rights gained with the abandonment in Bankruptcy.)

SUMMARY OF ANALYSIS OF DEFENDANTS IN THIS ACTION

The Appellants were brought into a foreclosure action wherein NONE of the DEFENDANTS had any interest on which to foreclose. Therefore it is believed this lawsuit is an exercise in futility brought to harass these Defendants/Appellants. The Motion before the lower court to include Indispensable Parties was denied. Appellants have been informed of another party seeking to purchase the Thornhill Note — NOT the Plaintiff which brought the action. Also, there was a mis-delivery of the Complaint and summons during the time when the Automatic Stay of Bankruptcy hearings would have still been in effect.

OUTSTANDING ISSUES

The Complaint was one of Foreclosure, NOT Quiet Title. The lower court, without motion to do so, changed it, then appeared to vacillate between foreclosure and quiet title, as would best protect the interests of the court. The court is faced with a dilemma — Either the action is a Quiet Title or it is a foreclosure. If it is a foreclosure, then ALL defendants should be given

the right of redemption: IC § 11-403. If the action is a Quiet Title, then Andersens have a right to set-off against the damages sought by the Respondent in the amount of $690,000 to $870,000 as per the Counterclaim. IC § 6-404.

> IC § 6-404: When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, **the value of such improvements must be allowed as a set-off against such damages**.

The court and the Plaintiff/Respondent were presented with a Tender Offer AND a backup Offer to buy the Note. However, there were 3 issues that needed to be resolved:

1. Was there actually a debt?
2. What was the accurate amount of that debt, if any?
3. Title — Correcting the deeds to solidify the contract.

A SUMMARY JUDGMENT when these material issues were outstanding was untimely.

ANALYSIS OF THE OUTSTANDING ISSUES

1. Was there actually a remaining debt? Appellants have claims of $690,000 for improvements made to correct faulty installations violating code and without permit — wherein the Seller represented otherwise in the Sellers' Disclosure Statement (CSR, p. 117-118). An Omitted Counterclaim was submitted to the lower court accordingly (CSR, p. 38-41) which totals $870,000. Appellants also have claims for payments made on a contract wherein the property was NOT deeded to the buyers, as well as business losses due to the improper closing of the business. The Omitted Counterclaim alone EXCEEDS any inflated amount claimed by the

Plaintiff/Respondent. An offer was made by the Guarantor to the Partnership Note (the obligation) to meet whatever was finally determined to be the correct amount. That amount was in dispute, and never resolved.

2. What was the accurate amount of the Debt, if any? The following factors have never been accounted for by the Plaintiff/Respondent.

   a. Assignor (Thornhill) to the Plaintiff/Respondent claimed to NOT receive certain payments made directly to him (see CSR, p. 81- 84, and p. 86-96).

   b. In order to claim $254,000 owed as of April 12, 2002 (CSR, p. 101, par. 13), Thornhill would have received ALL payments, and the debt calculated utilizing the amortization schedule.

   c. There was no notice of defaulted payment prior to the bankruptcy period.

   d. In a letter addressing "deeds", dated July 19, 2001, Attorney Eliasen, FBO Thornhill declared that payments would increase as of August 1, 2001 — indicating that payments were current at that time (CSR, p. 98).

   e. In their private agreement between Thornhill and McKinney in December of 2000, Thornhill accepted the full payment of $5,000 from McKinney, retaining, but not acknowledging the $1,000 partial payment from the Andersens. *NOTE: It was believed A&B LLC had met their full obligation on the mortgage payments as per the partnership agreement, and it was understood that McKinney was meeting the Baker portion of the Mortgage.*

   f. Thornhill claimed, removed, sold or destroyed personalty and fixtures from the property amounting to nearly $200,000.

g. Thornhill had earnings from the business in 2003, and rents from Ells' home after ousting the Andersens (CSR, p. 161, par. c). Thornhill had passed title to the home free & clear in 1996 prior to the purchase of Indian Springs.

h. Thornhill sold or assigned his interest to at least one other party (CSR, p. 173-175), PRIOR to the current Plaintiff/Respondent, and is believed to have pocketed the earnest money. In the prior agreement, he promised to deliver the property, but was unable to do so because of the confused title, and then failed to return the earnest money to the proposed buyer.

3. Finally, the Respondent and the Assignor refused to correct the deeds that were clearly in error. *(NOTE: it is believed and evidence from the Respondent's attorney's billing charges and the letter from Idaho Power [see Exhibit entitled "Motion for Title Clarification, Rescission of Deeds, and Dismissal of Case - Exhibit D] refusing to reinstall the power to the Ells home indicate a continuing conspiracy between Thornhill, his assignee and certain defendants with the intent and purpose to deprive parties and non-parties of their investment.)* The Title issue could have been resolved by correcting the Deeds, but that was not the Plaintiff's agenda and it was refused along with the back-up offer.

THEREFORE, it is believed there is no resolution. The contract failed when the deeds were issued to parties that were not the purchaser. Money taken on the basis of a failed contract and associated losses and damages relate back to the original seller and apparently his Assignee, the Plaintiff/Respondent.

ARGUMENT

The Respondent's Brief should be stricken from the record on the basis that it has been submitted and signed by one "Scott J. Smith", an attorney unknown to Appellants who has NOT MADE AN APPEARANCE ON BEHALF OF THE PLAINTIFF. However, the Appellant makes arguments on particulars found in the brief which could justify the striking of the brief in its entirety.

The Respondent's Brief has repeated many of the same misrepresentations relied upon by the lower court. On pg. 8, for example, Respondent lumps Husband & Wife teams together collectively as Buyers. On pg. 9, Respondent assumes that the "Andersen Living Trust" was one of the buyers. However, as previously stated in this Reply Brief, the "Andersen Living Trust" "does not exist, and has never existed outside its construction in the Thornhill deeds and the members of A&B LLC have no interest in forming said trust to replace their fully organized LLC, nor is it timely."

PLAINTIFF/RESPONDENT CANNOT UTILIZE A FAILED INSTRUMENT TO JUSTIFY ITS CLAIMS.

On pg. 9, Respondent claims that Buyers transferred their interests to AICO. However, the Warranty Deed from Bakers to AICO was placed in Escrow, and was errantly extracted from escrow and recorded by American Title Company under the direction of Ron Bitton of PES.

> **NOTE: If the Baker Deed were valid, then there would be NO OBLIGATION for AICO to perform on the original Mortgage. The Warranty Deed would transfer the property unencumbered — meaning that there would be no obligation to either Thornhill nor McKinney.**

HOWEVER, this "deed" also claims that the Bakers' had ownership of the property.

According to the partnership agreement and partnership funds used for the purchase, Bakers had interest in the partnership ONLY — NOT IN THE PARTNERSHIP PROPERTY.

> IC § 53-3-501 – A partner is not a co-owner of partnership property and has no interest in partnership property which can be transferred, either voluntarily or involuntarily.
>
> IC § 53-3-502 – The only transferable interest of a partner in the partnership is the partner's share of the profits and losses of the partnership and the partner's right to receive distributions. The interest is personal property.
>
> IC § 53-2-701 – The only interest of a partner which is transferable is the partner's transferable interest. A transferable interest is personal property.

By Idaho Law, and the wording of the "Baker Deed", this instrument FAILS to transfer the property to AICO. The Plaintiff/Respondent cannot rely on a failed instrument to justify its claim that AICO became the owner.

THE QUITCLAIM DEED DID NOT TRANSFER INDIAN SPRINGS TO AICO

In paragraph C, pg. 10, the Respondent claims that an "Andersen Living Trust" continued to claim an interest in Real Property "after transferring its interest to AICO." Two problems exist with the Respondent's claim here. First, there is no "Andersen Living Trust", as described previously in this Reply Brief. In the previous paragraph "B", the Respondent is referring to a quitclaim deed (CR, p. 200) wherein AICO of Colorado transferred any interest that it may have had to AICO of Idaho. THERE IS NO MENTION OR REFERENCE to an "Andersen Living Trust" in this Deed. Terry Andersen signed as Trustee, on behalf of AICO Colorado, where "Terry Andersen, Trustee"

was the manager. This did not, and could not, transfer a non-existent ownership — only any possible interests that AICO of Colorado had.

> **Quitclaim Deed** - a deed which conveys that right, title, or interest which the grantor has, or may have, and which does not require that the grantor thereby pass a good title. A quitclaim deed may be purchased for a small sum as protection against the possibility that the grantor has a substantial interest unknown to him. **The grantor of a quitclaim deed does not represent that he or she has any interest whatever in the property for which the deed was given — merely that whatever interest is had may be conveyed to the grantee.** (Barron's Law Dictionary copyright 1996)

As previously stated, AICO of Colorado was dissolved, and its interests passed to A&B LLC. The "Andersen Living Trust" is NOT designated in the quitclaim deed dated February 24, 1998. Andersens had NO KNOWLEDGE of this "Andersen Living Trust" appearing on the Deeds until the year 2002, — FOUR YEARS LATER — when they finally received a copy of the Deeds. Therefore, without knowledge of the "Andersen Living Trust" shown on the Seller's Deeds, this quitclaim deed could only be what it is now testified to be: a transfer of whatever interests AICO of Colorado had to AICO of Idaho. The Respondent's argument FAILED to establish that a non-existent trust transferred title to AICO.

NEITHER PARTNER COULD TRANSFER THE PROPERTY AS THEIR OWN

On page 16 of the Respondent's Brief, it is argued that "Terry Andersen as Trustee and the Bakers chose to transfer the Real Property to AICO and not to Recreational Properties A&B." This worn out argument comes from the mistaken idea that the "Baker Deed" and the quitclaim deed transferred the property to AICO. As discussed previously, the "Baker Deed" is faulty. The Andersen quitclaim deed was written only as part of the winding up of the affairs of AICO of Colorado. Idaho Statutes quoted above would PROHIBIT THE TRANSFER of the property by EITHER PARTNER.

Property purchased with partnership funds belongs to the partnership, and NOT TO THE PARTNERS INDIVIDUALLY. The partners interest is in the profits and losses of the partnership — NOT in the partnership property. The ONLY transferable interest is the partner's interest in the partnership. BOTH DEEDS (Baker Deed & the quitclaim Deed) FAIL on the grounds that neither partner could transfer the property. Neither Deed makes mention of the partnership transferring the property.

AMBIGUITIES IN THE CLOSING DOCUMENTS

Paragraph "D" of pg. 11 in the Respondent's Brief admits in the last sentence that the Real Estate Mortgage "does not contain any reference Recreational Properties A&B, a partnership." This is true, and this statement supports the Appellants' argument that THERE IS AMBIGUITY IN THE CLOSING DOCUMENTS. The deeds are in conflict with all of the documents as previously stated in this Reply Brief as to the sale and mortgages herein, and this ambiguity, on its face, compels the Supreme Court to remand for further investigation of these facts and to further clarify who ought to have rights to Indian Springs. With patent ambiguities between and among this transaction, it permits the Supreme Court to exercise free review. (See *Dr. James Cool, D.D.S. v. Mountainview Landowners Co-op Ass'n, Inc.,* 139 Idaho 770, 86 P.3d 484,486 (2004); cf *Union Pac. R.R. Co. V. Ethington Family Trust,* 137 Idaho 435, 437-38. 50P.3d 450, 452-53 (2002).) Clearly on this point, when there are legal ambiguities, free review by the Supreme Court is required and permitted, to first determine whether a legal instrument is ambiguous, which is clearly the situation here — as admitted and sustained by the Respondent's Brief.

These ambiguities in the closing documents should lead the Supreme Court to the

Doctrine of CONTRA PROFERENTEM.

> ***Contra proferentem*** (Latin "against the offeror") The doctrine that, in interpreting documents, ambiguities are to be construed unfavorably to the drafter. (Black's Law Dictionary - Abridged Seventh Edition - 2000)

SELLERS ASSIGNED INTEREST WITH UNCLEAN HANDS

Respondent claims that the Sellers of the Property assigned interests in a Promissory Note and Mortgage to the Plaintiff/Respondent. This action is supported by an instrument entitled "Assignment of Promissory Note and Mortgage" (CR, p. 284). However, the Seller previously assigned those same interests to another party via an earnest money agreement (CSR, p. 173-175). Seller **failed to produce clear Title**, and **failed to return the Earnest Money.** This puts a cloud on the Plaintiff/Respondent's claim of assigned interests.

> UNCLEAN HANDS — one of the maxims of **equity** embodying the principle that a party seeking redress in a court of equity (equitable relief) must not have done any dishonest or unethical act in the transaction upon which he or she maintains the action in equity, since a court of conscience will not grant relief to one guilty of unconscionable conduct, i.e., to one with "unclean hands." See 171 A. 738, 749, McClintock, Equity §26 (2d ed. 1948). (Barron's Law Dictionary copyright 1996)

While the lower court overlooked or turned a blind eye to the evidence substantiating these claims, Appellants claim the evidence of the Earnest Money Agreement to a third party for the same transferral of interests casts a cloud on the Plaintiff/Respondent's claim to said assignment. The Seller exhibits a pattern of: a) denying payments he received directly; b) collecting rents on a home he had sold; and c) claiming goods and personalty and removing fixtures, and benefitting financially without accountability.

ISSUES WITH RESPONDENT'S "COURSE OF PROCEEDINGS"

1. When the Complaint was filed (Sept. 27, 2005), and also when the Appellant's Answer was filed (Dec. 5, 2005), one of the Defendants, AICO - Idaho, was still under the protection of the Bankruptcy Stay. There should have been no action until after December 19, 2005, when the Bankruptcy was officially closed. The Notice of Default was also delivered during the time of the Automatic Stay. THERE SHOULD HAVE BEEN NO NOTICE OR COMPLAINT UNTIL AFTER DECEMBER 19, 2005.

2. The question arises Why did the Plaintiff/Respondent file the First Amended Complaint, dated June 12, 2006?

   a. Was it to hide the "Dirty Hands" of Thornhill/Eliasen? Environmental issues pass to everyone in the chain of title, so Thornhill and the Assignee (Plaintiff/Respondent) would still have an obligation.

   b. It is noteworthy that not only Eliasen withdrew, but Thornhill was removed as a Plaintiff in the Amended Complaint.

   c. The Amended Complaint still used the same Notice of Default which was issued during the Bankruptcy Stay.

3. Page 13 and 14 of the Respondent's Brief raises the question as to A&B and the Title. Appellants have previously stated that the Deeds should have been issued to A&B, but they were not. As the documented evidence supports, the intention of the parties was to have Title transfer to A&B. An opportunity was given for the Plaintiff to correct said deeds, but they did NOT. The court correctly stated that A&B was the purchaser, but then based its Memorandum, Decision, and Order on misrepresentations presented by the

Plaintiff/Respondent.

4. The lower court favored the amount owing on the mortgage provided by the Plaintiff/Respondent. The lower court completely ignored the prior statements by the Assignor Thornhill. On April 12, 2002, Thornhill's sworn statement said the amount owing at that time was $254,000. On June 5, 2003, the sum that would have paid the obligation was fixed at $263,400. During the interim, the Assignor's record declares that $66,000 in payments were made during that time. HOW does the amount owing INCREASE by $9,600 on a 0% contract when payments amounting to $66,000 were received? ALSO, how does the Plaintiff/Respondent arrive at the amount of $248,000 plus late fees and interest in the Amended Complaint? If the sworn amount due and owing in 2002 were $254,000, and $66,000 were paid, the balance due and owing on June 5, 2003 would have been only $188,000. Such discrepancies were presented to the lower court on January 16, 2007 in the Exhibit *Defendants' Second Response to Motion for Summary Judgment - pp. 13-14.*

5. On pg. 16 of the Respondent's Brief, argument is made that because Terry Andersen and John Baker transferred the Real Property to AICO, that A&B has no rights or interests in the property. The documents used by the Respondent to substantiate this false claim is just a small part of the misrepresentations and wrongful assumptions which prompted the Appellant's Motion for Reconsideration, Joining of Indispensable Parties and New Trial. The lower court's denial of this Motion is one of the issues why the whole matter is under Appeal. Appellants assumed the issue was to settle the Note with Thornhill, and proceeded accordingly — but clearly, that was NOT the intent of the action.

6. On pg. 17, reference is made to new evidence. That new evidence is none other than the letter

faxed to the Andersens on May 14, 2007 — which letter (CSR, Exhibit B) was in the files of Metro Title in Salt Lake City, and is considered "new evidence" by the Andersens. This letter is the letter from Attorney Lyle Eliasen to Metro Title dated June, 1996, but not discovered by the Andersens until May 14, 2007.

IC § 5-218 STATUTORY LIABILITIES, TRESPASS, TROVER, REPLEVIN, AND FRAUD. Within three (3) years:

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

The letter was introduced as new evidence under the IRCP 60(b)(3), and in court, Attorney Erickson claimed "there is no 60(b)", and here again, the Respondent is attempting to block the rights of the Andersens to submit new evidence.

> IRCP 60(b). Mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, grounds for relief from judgment or order. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), **misrepresentation,** or **other misconduct of an adverse party**;

Again, on pg. 17 and pg. 18 of the Respondent's Brief, the Plaintiff is confusing the Court again by claiming that the new evidence was "untimely." For the Record, under IRCP (60)(b)(3) AND within the time limits established by IC § 5-218, there is a period of three (3) years in which this evidence can be submitted — placing the Statute of Limitations from the time of discovery to May 14, 2010!

ISSUES ON APPEAL

A Motion for Dismissal of Non-Defaulting Parties was brought up in the lower court on November 9, 2007, and certain documents were to be added to the record. Neither the motion nor the Exhibits appear in the Record, and the Minute Entry & Order signed on December 3, 2007 is contrary to the verbal order made in court.

On August 9, 2007, a hearing was held concerning the Appellants Motion for Reconsideration, Joining of Indispensable Parties, and New Trial under I. R. C. P. 60 (b) newly discovered Evidence clarifying Title issues, and the Motion was denied. The judge's demeanor was openly hostile to the Andersens, and this motion and all of the exhibits, including an omitted Counterclaim under rule IRCP13(c) and IRCP13(f) were not included in the Clerk's Record.

On November 19, 2007, a Judgment, Decree of Foreclosure and Order for Sale was signed by the Honorable Ronald E. Bush wherein he granted rights to any and all property in question without due process of law and without including Indispensable Parties and real parties of interest. Judge Bush also denied Appellants the right to have their Tender Offer accepted, as presented by and through the Trust as the Guarantor on the Note F. B. O. Recreational Properties A&B, a Partnership.

On or about December 1, 2006, a Notice of Offer to Purchase Note and Mortgage on behalf of the Appellants was entered into the lower court. This tender offer was not accepted. Idaho Code 28-3-603 (2) states that when an offer is refused, the debt is considered discharged.

Appellants ask the court to rule on the following:

A. That the lower court abused its exercise of discretion in denying the Motion for Reconsideration, Joining of Indispensable Parties, and New Trial. In this action, the lower court allowed for a private sale also denying the Appellants a right of redemption.

B. That the lower court abused its exercise of discretion, and failed in Due Process by denying the Dismissal of Non-Defaulting Parties, which included parties never noticed in the Notice of Default, and parties not served which were protected under the bankruptcy stay, and the joining of Indispensable Parties. The action in the lower court was an exercise in futility with none of the defendants having any interest in the Real Estate being foreclosed on.

C. That the lower court abused its exercise of discretion by denying the Motion for Dismissal of Non-Defaulting Parties in a case deficient in process and wherein Plaintiffs' standing to bring the action is in question because of a standing prior assignment of the same interest that the Plaintiff claims.

D. That the lower court abused its exercise of discretion by ordering the Foreclosure and Sale of the subject party without due process for Indispensable Parties who have an interest in the Subject Property.

E. That the Mortgage Debt is discharged by the means of the UCC rules concerning a refused Tender Offer (Idaho Code 28-3-603 (2)). The lower court failed to recognize and rule on the Tender Offer submitted December 1, 2006. A proper ruling under the UCC rules would vacate any action of Foreclosure FBO the Partnership.

F. That the claim of the Plaintiff/Respondent be offset by the Counterclaim submitted by the Andersens as managers of A&B LLC, and as per their personal investment.

G. That the ruling of the lower court finding the Andersens in contempt be remanded on the grounds that Andersens have complied with the orders of the court, and that this Contempt Charge is believed to be a red herring to draw the attention away from the deliberate frauds the Plaintiff's Agent was perpetrating on the court.

An additional issue on appeal was brought up by the Respondent. That issue has to do with the Andersens representing other parties — specifically (as stated in the Respondent Brief, page 25), *"Recreational Properties A&B, LLC, Recreational Properties A&B, a partnership, The Terry W. Andersen and Rosanna Andersen Living Revocable Trust, and the Andersen Living Trust."* The Respondent repeatedly lumps all of these parties together, dropping or adding parts of the legal titles to create confusion. This appeal has been filed by the Andersens for their personal interests.

At the risk of being redundant, Andersens offer the following considerations in opposition to the Respondent's arguments to the contrary.

- Recreational Properties A&B, a partnership, has been dissolved, and as managers, the Andersens are personally responsible and liable to expedite the winding up of the partnership. Therefore, the affairs of this partnership is now a personal involvement which will continue until the process is completed. (IC § 53-3-803 and 53-3-806)
- AICO Recreational Properties LLC, is in the process of winding up its affairs, and the Andersens are personally responsible and liable to expedite this winding up of affairs as managers. Therefore, the affairs of this LLC is now a personal involvement which will continue until the process is completed. IC § 644
- The Andersen Living Trust is believed to exist ONLY in the Thornhill Deeds. This trust was NOT a partner NOR the buyer of Indian Springs. Andersens seek the Court to remand the case, and instruct the lower court to order a correction in the Deeds.
- The Respondent refers to The Terry W. Andersen and Rosanna Andersen Living Revocable Trust which is not a Defendant. This appears to be another ruse to make

all parties appear to be the same. Terry Ward Andersen and Rosanna Andersen are Trustees of The Terry Ward Andersen and Rosanna Andersen Living Revocable Trust dated February 1, 1991, and NO OTHER. This family trust is shown as the Guarantor for the Partnership on the Thornhill Note. NOTE: *Trustees have a number of powers enumerated by Idaho Statutes, including the defense and prosecution of matters pertaining to the Trust. IC § 105 AND IC § 68-106 (25)*

- Recreational Properties A&B LLC: This is the only real party actually shown on the deeds with a viable interest in the property as described in this Reply Brief. This party is not a Defendant nor a partnership, but does have an interest. The lower court refused to join this company and other Indispensable Parties to this action. As Managers of this company with a vested interest, Terry and Rosanna Andersen have the rights and responsibilities to speak up for this company and its members.

SUMMARY

THIS REPLY BRIEF has addressed the issues of the Motions denied by the lower court. Subsequent to the filing of the Notice of Appeal and the Notice of Amended Appeal, it has become necessary to submit a Notice of Second Amended Appeal because of the unfounded claims of Attorney Lane V. Erickson, who is also the Agent for Indian Springs LLC — the Respondent. Erickson filed a Motion for a Rule 75 Contempt with the lower court seeking to restrict constitutionally guaranteed rights of the Andersens, while misleading the lower court on the issues. The lower court ruled on that motion, and the Andersens have respectfully withdrawn those supposedly offending documents. It is believed that the court rushed into a Summary Judgment when

there remained material issues of fact and parties with unaddressed issues. There was no resolution — only grounds for additional actions and dispute.

The Andersens have invested thousands of hours into correcting environmental and public safety problems which were NOT disclosed by the Seller. The Andersens proceeded with the purchase of the property in good faith that the Disclosure Statement was true and accurate. When it was discovered to be fraudulent, Andersens made the investment of TIME and MONEY to begin the corrections and improvements. Now, after seven years of management and work, and another eight years in courts trying to protect their and their associate's investment of time and money, the Andersens Move the Supreme Court to remand this case, and instruct the lower court to award the Andersens for damages according to the Supreme Court's findings.

CONCLUSION

This whole case from the start is an exercise in futility in that the Plaintiff/Respondent has named Defendants who have NO INTERESTS on which to foreclose. As explained in this Reply Brief, NONE of the Defendants listed in the caption have any viable interest. The only viable party that claims an interest is Recreational Properties A&B LLC (referred to as A&B LLC) because it is a party in the purchase of Indian Springs and is shown on the deeds defining their intent. Though not a party in this action, there is a claim predating the partnership and Terry and Rosanna Andersen as Member-Managers have been encouraged to speak on behalf of this company and its members.

THEREFORE, Appellants move the Supreme Court to remand the case back to the District Court, and instruct the Court to Dismiss the Case, to clear the charge of Contempt, and to award the Andersens damages brought upon them by the failure of the deeds to convey the property as

intended.

Respectfully submitted this 25th day of August, 2008.

Terry W. Andersen

Rosanna Andersen

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2008, I served two(2) true and correct copies of the foregoing to the following:

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By _____
Terry Andersen